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IN THE

Supreme Court of the United States

October Term, 1971.

No. 71-106

THE CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, et al.,
Petitioners,

v.

THE SECRETARY OF LABOR, JAMES D. HODGSON, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX.

	Page
REPORTS OF OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	5
ARGUMENT	8
CONCLUSION	12
APPENDIX:	
Court of Appeals Decision	A1
Court of Appeals Judgment	A34
District Court Decision	A36

TABLE OF CITATIONS.

Cases:

Griggs v. Duke Power Co., — U. S. —, 91 S. Ct. 849 (1971) 10

Statutes:

Civil Rights Act of 1964, Title VII 3, 6, 9, 10, 11
28 U. S. C. § 1254(1) 2

Rules:

Fed. R. Civ. P. 56 3

Opinions and Orders:

Executive Order 11246 3
14 Comp. Gen. 648 (1935) 9
42 Op. Att'y Gen., Op. No. 37 (1969) 6
49 Op. Comp. Gen. 59 (1969) 6

Congressional Record:

115 Cong. Rec. 17625 (Dec. 22, 1969) 7

REPORTS OF OPINIONS BELOW.

The petitioners request this Court to issue a writ of certiorari to the United States Court of Appeals for the Third Circuit (hereinafter called the "Court of Appeals") to review an erroneous judgment of that court.

The opinion delivered upon the rendering of that judgment is reported at 442 F. 2d 159 (3rd Cir. 1971).

The judgment which is the subject of this petition affirmed a decision by the United States District Court for the Eastern District of Pennsylvania (hereinafter called the "District Court"). The opinion delivered upon the rendering of that judgment is reported at 311 F. Supp. 1002 (E. D. Pa. 1970).

JURISDICTION.

In addition to The Contractors Association of Eastern Pennsylvania, the petitioners are intervening plaintiffs in the District Court: The Conduit & Foundation Corp.; Glasgow, Inc.; Buckley & Company; The Nyleve Company; Erb Engineering & Construction Co.; Perkins Kanak, Foster, Inc.; Lansdowne Contractors, Inc.; and James D. Morrissey, Inc.

In addition to The Secretary of Labor, the respondents are The Assistant Secretary of Labor, Arthur A. Fletcher, The Director, Office of Federal Contract Compliance, John L. Wilks, The Secretary of Agriculture, Clifford M. Hardin, and The General State Authority of The Commonwealth of Pennsylvania.

The judgment of the Court of Appeals for which review is sought was rendered and entered on April 22, 1971.

A rehearing relating to the judgment sought to be reviewed was not requested.

An enlargement of the time within which to file this petition was not requested.

This Court has jurisdiction to review the judgment in question by writ of certiorari by virtue of 28 *U. S. C.* § 1254(1).

QUESTIONS PRESENTED.

(i) Did the Court of Appeals err when it held that the promulgation and application of the so-called "Philadelphia Plan" is within the constitutional power of the Executive branch of the federal government even though, in addition to other reasons, the Plan requires conduct by a contractor which directly and plainly violates Title VII of the Civil Rights Act of 1964 and otherwise contravenes the will of Congress?

(ii) Did the Court of Appeals err when it held that the promulgation and application by the Executive branch of the federal government of the so-called "Philadelphia Plan" is not inconsistent with and beyond the scope of Executive Order 11246, under which order the Plan allegedly was promulgated and was and is being applied?

(iii) Did the Court of Appeals err when it failed to hold that the promulgation and application of the so-called "Philadelphia Plan" is unlawful in that such promulgation and application is an arbitrary and capricious exercise of power by the Executive branch of the federal government, especially since it is directed to contractors instead of the labor organizations which allegedly performed the discrimination which the Plan seeks to remedy, has contradictory provisions each impossible of performance, and requires contractors to participate in an unreasonable classification of individuals in violation of the equal protection principles of the 5th and 14th Amendments to the Constitution of the United States?

(iv) Did the Court of Appeals err when it failed to hold that the District Court was not authorized under *Fed. R. Civ. P.* 56 to grant respondents' motion for summary judgment, not only because respondents were and are not en-

titled to a judgment as a matter of law, but also because there exists in the record at least one genuine issue as to a material fact?

(v) Did the Court of Appeals err when it failed to hold that the promulgation and application by the Executive branch of the federal government of the so-called "Philadelphia Plan" is unlawful in that conduct pursuant to the Plan interferes with the Congressional protection afforded to lawful union referral systems?

(vi) Does petitioner The Contractors Association of Eastern Pennsylvania have standing to make and prosecute to judgment the claims in this action?

STATEMENT OF THE CASE.

This case presents squarely for judicial decision the question of whether or not the promulgation and application by the *Executive branch of the federal government* of the so-called "Philadelphia Plan" is unconstitutional and otherwise unlawful.

The "Philadelphia Plan" was created, promulgated in June and September, 1969, and is being applied by an office in the United States Department of Labor. Its avowed objective is to attempt to remedy the alleged results of certain exclusionary practices allegedly engaged in by labor unions in six construction crafts in Philadelphia and four juxtaposed counties.[1] Those alleged exclusionary practices, it is contended, deprived certain minorities[2] of jobs in the covered crafts.

The method of the "Philadelphia Plan" is preferential hiring of the chosen minorities, the objective of which is the attainment of quotas specified in the Plan. The core of the Plan is the requirement of a promise by a contractor on any federal or federally-assisted construction contract in the Philadelphia five-county area the estimated total cost of which exceeds $500,000 to hire a specified number of minority group persons in any craft covered by the Plan which will be used in that project.[3] A failure to reach the quota subjects the contractor to the risk of expulsion from the covered

1. The crafts which are the subject of the Plan, which are referred to in the Plan as "critical trades", are Ironworkers, Plumbers-Pipefitters, Steamfitters, Sheetmetal Workers, Electrical Workers, and Elevator Construction Workers. The counties in addition to Philadelphia are Bucks, Montgomery, Chester, and Delaware.

2. The Plan defines minorities as ". . . . Negro, Oriental, American Indian and Spanish Surnamed American. Spanish Surnamed American includes all persons of Mexican, Puerto Rican, Cuban or Spanish origin or ancestry."

3. The "Philadelphia Plan" has recently been expanded to cover all projects of a bidding contractor, public and private.

project, as well as debarment from future federal and federally-assisted construction contracts.

The petitioners are an association of heavy, highway, and utility contractors located in Philadelphia, the members of which perform more than $150,000,000 of federal and federally-assisted construction work annually in the Philadelphia five-county area which is subject to the Plan, and eight members of that association. This case was brought to enjoin the use of the Plan for a project in Chester County.

The respondents are the federal officials who promulgated the Plan, the federal officials who applied the Plan to the Chester County project, and the Pennsylvania contracting agency for that project.

The District Court, in response to a motion for summary judgment by the respondents, held in substance that the Plan is constitutional and is not otherwise unlawful.

The Court of Appeals affirmed.

Before this case was commenced in January of 1970, the Comptroller General of the United States issued an opinion that the Plan requires conduct by a contractor which violates Title VII of the Civil Rights Act of 1964. Accordingly, he announced that his office, the General Accounting Office, would treat expenditures by the Executive for the Plan as unlawful and unauthorized disbursements.[4]

Promptly after that opinion of the Comptroller General was issued, the Attorney General issued a conflicting opinion. He opined that the Plan is a constitutional and otherwise lawful exercise of power by the Executive,[5] and directed that disbursing officers could and should disburse funds to finance the Plan.

This conflict of significant opinion not only created a dilemma of major proportions for disbursing officers, but

4. 49 Op. Comp. Gen. 59 (1969).
5. 42 Op. Att'y Gen., Op. No. 37 (1969).

also exposed contractors to the risk that disbursements under covered contracts would be withheld pending resolution of the conflict.

In response to the conflict of opinion between the so-called "watchdog" of the Congress and the lawyer for the Executive, the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary held hearings in October, 1970 as the first step in an attempt to resolve it. The result of those hearings is a report stating that the Plan is an unconstitutional exercise of Executive power. However, responding to a plea by the President, Richard M. Nixon, to leave the resolution of this conflict to the judiciary, Congress declined to enact appropriate legislation.[6]

Within two weeks thereafter, this action was commenced.

Since the Plan was first promulgated for the Philadelphia five-county area, similar plans also have been installed in Metropolitan Washington, D. C. and San Francisco, California. Furthermore, since then, the United States Department of Labor announced that similar plans would be installed in seventeen other cities. These cities are Atlanta, Buffalo, Cincinnati, Detroit, Houston, Indianapolis, Kansas City, Miami, Milwaukee, Newark, New Orleans, New York, Denver, Boston, St. Louis, Los Angeles, and Seattle.

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6. 115 Cong. Rec. 17625 (Dec. 22, 1969).

ARGUMENT.

This case presents very important issues of federal law which have not been and should be settled by this Court.

This case focuses upon a conflict of major significance between the other two branches of the national government. And, both the President on one hand and the Congress on the other hand agree not only that the conflict between them, as evidenced by the conflicting opinions of the Comptroller General and the Attorney General, must be resolved, but also that the federal judiciary should be the entity to effect that resolution. These facts alone warrant the exercise of this Court's discretionary jurisdiction through the vehicle of a writ of certiorari.

The conclusion that this Court should consider and decide the merits of the controversy presented by this case is strengthened when, among others, three points are considered.

First, whether or not the promulgation and application of the "Philadelphia Plan" are unconstitutional and/or otherwise unlawful is a question having national importance. Although it is true that the Plan has a very great effect upon the petitioners and others similarly situated within the five-county Philadelphia area,[7] it also has or will have a great effect throughout the country. Literally thousands of business organizations will feel its touch, as will many more individuals. Many labor organizations too are and will be affected by it. The national scope of this problem is readily realized when reflection is given to the fact that, in 1969 approximately 10% of the gross national production was by the construction industry, the target of the Philadelphia Plan.

Second, only a decision by this Court can extinguish the uncertainty of contractors, relating principally to the

7. For example, it has likewise a very great effect on the members of an amicus curiae in the Court of Appeals, the General Building Contractors Association, headquartered in Philadelphia.

disbursement of funds to them for a project covered by the Plan, which stems from the conflict of opinion between the Comptroller General and the Attorney General. This is so simply because the Comptroller General deems himself and his office bound only by a decision of this Court.[8] Therefore, although the Court of Appeals has rendered a decision on this matter, that decision in no way resolves the conflict to the extent that its attendant uncertainty is removed.

Third, the decision of the Court of Appeals unduly and indeed alarmingly broadens the power of the Executive branch under the Constitution of the United States. This point readily may be realized when the true nature of the Plan is perceived. The Philadelphia Plan plainly is a far-reaching piece of social legislation which was formulated and promulgated and is being applied by the Executive branch. Thus, although traditionally the power to legislate in the upper part of our federalism has been lodged in the Congress, the decision of the Court of Appeals now tells the government and citizens alike that the power to legislate should not be so restricted. In view of this, and especially in view of the paucity of authority defining the power of the Executive, this Court should use this case to settle the principle that the Executive does not have the power to legislate.

Furthermore, as a necessary step in sustaining the exercise of power involved in this case, the Court of Appeals held that the conduct required of a contractor by the Plan does not violate Title VII of the Civil Rights Act of 1964 and thus that the Plan is not contrary to the express will of Congress.[9] However, in reaching its decision, it is without

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8. 14 Comp. Gen. 648, 652 (1935).

9. The Attorney General, the Comptroller General, the District Court, the Court of Appeals, the petitioners, and the respondents all agree that, if the Plan requires conduct which violates the Civil Rights Act of 1964, it should not be sustained.

doubt that the Court of Appeals, as did the District Court, failed to come to grips with a question which must be dealt with in correctly and soundly deciding whether conduct under the Plan violates Title VII. Briefly, any objective reading of the legislative history of Title VII can lead a fair-minded person only to the conclusion that the Congress intended by Title VII to prohibit the use in the hiring process and the employment relationship, in addition to other irrelevant characteristics, race, color, and national origin. Congress intended to outlaw *discrimination* on the basis of race, color, and national origin in hiring and employment, and it is plain from the legislative history that by *discrimination* Congress meant to discern, or to distinguish, or to take regard of, or to take note of, the difference between two individuals, or among more than two individuals, because of the difference respecting their races, the colors of their skin, or their national origins. Thus, by outlawing *discrimination* on the basis of race, color, or national origin, Congress *a fortiori* outlawed both *discrimination for* any individual and *discrimination against* any individual in hiring or employment.

The intent of Congress when it enacted Title VII of the Civil Rights Act of 1964 recently was recognized by this Court in *Griggs v. Duke Power Co.*, — U. S. —, 91 S. Ct. 849 (1971). In that unanimous decision, Mr. Chief Justice Burger stated:

> "Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. *Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.* What is required by Con-

gress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[10]

The District Court found as a fact, quite correctly, that the Philadelphia Plan does require *discrimination* on the basis of race, color, and national origin. The Court of Appeals did not disturb that finding, and in fact confirmed it when it said: "Clearly the Philadelphia Plan is color-conscious."[11]

In view of these findings, and in view of the clear intent of Congress to outlaw in hiring and employment color as well as ethnic consciousness, it is difficult, if not impossible, for petitioners to understand how the Court of Appeals, and for that matter the District Court, could decide that conduct under the Plan does not violate Title VII. Therefore, this Court should take jurisdiction of this case and confirm the clear intent of Congress in enacting Title VII.

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10. At 91 S. Ct. 853.

11. 442 F. 2d at 173.

CONCLUSION.

For the reasons set forth heretofore, this Court should issue a writ of certiorari to the United States Court of Appeals for the Third Circuit to review its judgment in this case.

Respectfully submitted,

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Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 19027.

THE CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA

v.

THE SECRETARY OF LABOR, GEORGE P. SHULTZ; THE ASSISTANT SECRETARY OF LABOR, ARTHUR A. FLETCHER; THE DIRECTOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE, JOHN L. WILKS; THE SECRETARY OF AGRICULTURE, CLIFFORD M. HARDIN; and THE GENERAL STATE AUTHORITY OF THE COMMONWEALTH OF PENNSYLVANIA.

JAMES D. MORRISSEY, INC.; THE CONDUIT & FOUNDATION CORP.; GLASGOW, INC.; BUCKLEY & COMPANY; THE NYLEVE COMPANY; ERB ENGINEERING & CONSTR. CO.; PERKINS, KANAK, FOSTER, INC.; and LANSDOWNE CONSTRUCTORS, INC. (Intervening Plaintiffs in D. C.)

THE CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA; JAMES D. MORRISSEY, INC.; THE CONDUIT & FOUNDATION CORP.; GLASGOW, INC.; BUCKLEY & COMPANY; THE NYLEVE COMPANY; ERB ENGINEERING & CONSTR. CO.; PERKINS, KANAK, FOSTER, INC.; and LANSDOWNE CONSTRUCTORS, INC.,

Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued March 1, 1971

Before HASTIE, *Chief Judge*, and MCLAUGHLIN and GIBBONS, *Circuit Judges*

OPINION OF THE COURT

(Filed April 22, 1971)

GIBBONS, *Circuit Judge.*

The original plaintiff, the Contractors Association of Eastern Pennsylvania (the Association) and the intervening plaintiffs,[1] construction contractors doing business in the Philadelphia area (the Contractors), appeal from an order of the district court which denied their motion for summary judgment, granted the motion of the federal defendants[2] to dismiss the Association complaint for lack of standing, and granted the cross-motion of the federal defendants for summary judgment.[3] When deciding these motions, the district court had before it the Association's verified complaint, a substantially identical complaint of

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1. James D. Morrissey, Inc.; The Conduit & Foundation Corp.; Glasgow, Inc.; Buckley & Company; The Nyleve Company; Erb Engineering & Constr. Co.; Perkins, Kanak, Foster, Inc.; and Lansdowne Constructors, Inc.

2. The Secretary of Labor, George P. Shultz; The Assistant Secretary of Labor, Arthur A. Fletcher; The Director, Office of Federal Contract Compliance, John L. Wilks; The Secretary of Agriculture, Clifford M. Hardin.

3. An additional defendant, the General State Authority of the Commonwealth of Pennsylvania, has not participated in this appeal.

the contractors, the affidavits of Vincent G. Macaluso and Ward McCreedy on behalf of the federal defendants which identified certain relevant documents, a stipulation by the parties as to certain facts, and two affidavits of Howard G. Minckler on behalf of the plaintiffs.

The complaint challenges the validity of the Philadelphia Plan, promulgated by the federal defendants under the authority of Executive Order No. 11246.[4] That Plan is embodied in two orders issued by officials of the United States Department of Labor, dated June 27, 1969 and September 23, 1969, respectively. Copies of these orders were annexed to the verified complaint as exhibits 1 and 2, respectively, and to the Macaluso affidavit as appendices B and C respectively. In summary, they require that bidders on any federal or federally assisted construction contracts for projects in a five-county area around Philadelphia,[5] the estimated total cost of which exceeds $500,000, shall submit an acceptable affirmative action program which includes specific goals for the utilization of minority manpower in six skilled crafts: ironworkers, plumbers and pipefitters, steamfitters, sheetmetal workers, electrical workers, and elevator construction workers.

Executive Order No. 11246 requires all applicants for federal assistance to include in their construction contracts specific provisions respecting fair employment practices, including the provision:

> "The contractor will take affirmative action to ensure that applicants are employed, and that em-

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4. 30 Fed. Reg. 12319 (Sept. 24, 1965), as amended by Exec. Order No. 11375, 32 Fed. Reg. 14303 (Oct. 13, 1967), 3 C. F. R. 406 (1969), 42 U. S. C. A. § 2000(e) (1970), superseded in part by Exec. Order No. 11478, 34 Fed. Reg. 12985 (Aug. 8, 1969), 3 C. F. R., 1969 Comp. 133, 42 U. S. C. § 2000(e) (1970).

5. Encompassing Bucks, Chester, Delaware, Montgomery and Philadelphia Counties in Pennsylvania.

> ployees are treated during employment, without regard to their race, color, religion, sex or national origin."[6]

The Executive Order empowers the Secretary of Labor to issue rules and regulations necessary and appropriate to achieve its purpose. On June 27, 1969 Assistant Secretary of Labor Fletcher issued an order implementing the Executive Order in the five-county Philadelphia area. The order required bidders, prior to the award of contracts, to submit "acceptable affirmative action" programs "which shall include specific goals of minority manpower utilization." The order contained a finding that enforcement of the "affirmative action" requirement of Executive Order No. 11246 had posed special problems in the construction trades.[7] Contractors and subcontractors must hire a new employee complement for each job, and they rely on craft unions as their prime or sole source for labor. The craft unions operate hiring halls. "Because of the exclusionary practices of labor organizations," the order finds "there traditionally has been only a small number of Negroes employed in these seven trades."[8] The June 27, 1969 order

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6. § 202(1). This wording comes from Exec. Order No. 11375, see note 4 supra, and represents a minor change from the original designed to parallel the classes of discrimination prohibited by Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000(e) et seq.

7. Recognition of this problem antedated the present Plan. Under the Philadelphia Pre-Award Plan, which was put into effect on November 30, 1967 by the Philadelphia Federal Executive Board, each apparent low bidder was required to submit a written affirmative action program assuring minority group representation in eight specified trades as a precondition to qualifying for a construction contract or subcontract. This predecessor Plan was suspended due to an Opinion letter by the Comptroller General stating that it violated the principles of competitive bidding. 48 Comp. Gen. 326 (1968).

8. The order of June 27, 1969 listed "roofers and water proofers" among the trades underrepresented by minority craftsmen. The order of September 23, 1969 dropped this category from the list, leaving the six trades previously named.

provided that the Area Coordinator of the Office of Federal Contract Compliance, in conjunction with the federal contracting and administering agencies in the Philadelphia area, would determine definite standards for specific goals in a contractor's affirmative action program. After such standards were determined, each bidder would be required to commit itself to specific goals for minority manpower utilization. The order set forth factors to be considered in determining definite standards, including:

> "1) The current extent of minority group participation in the trade.
>
> 2) The availability of minority group persons for employment in such trade.
>
> 3) The need for training programs in the area and/or the need to assure demand for those in or from existing training programs.
>
> 4) The impact of the program upon the existing labor force."

Acting pursuant to the June 29, 1969 order, representatives of the Department of Labor held public hearings in Philadelphia on August 26, 27 and 28, 1969. On September 23, 1969, Assistant Secretary Fletcher made findings with respect to each of the listed factors and ordered that the fol-

Identification of Trade	*Range of Minority Group Employment Until 12/31/70*	*for 1971*	*for 1972*	*for 1973*
Ironworkers	5%-9%	11%-15%	16%-20%	22%-26%
Plumbers & Pipefitters	5%-8%	10%-14%	15%-19%	20%-24%
Steamfitters	5%-8%	11%-15%	15%-19%	20%-%24
Sheetmetal workers	4%-8%	9%-13%	14%-18%	19%-23%
Electrical workers	4%-8%	9%-13%	14%-18%	19%-23%
Elevator construction workers	4%-8%	9%-13%	14%-18%	19%-23%

lowing ranges be established as the standards for minority manpower utilization for each of the designated trades in the Philadelphia area for the following four years:

The order of September 23, 1969 specified that on each invitation to bid each bidder would be required to submit an affirmative action program. The order further provided:

> "4. No bidder will be awarded a contract unless his affirmative action program contains goals falling within the range set forth . . . above . . .
>
> * * *
>
> 6. The purpose of the contractor's commitment to specific goals as to minority manpower utilization is to meet his affirmative action obligations under the equal opportunity clause of the contract. This commitment is not intended and shall not be used to discriminate against any qualified applicant or employee. Whenever it comes to the bidder's attention that the goals are being used in a discriminatory manner, he must report it to the Area Coordinator of the Office of Federal Contract Compliance of the U. S. Department of Labor in order that appropriate sanction proceedings may be instituted.
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> * * *
>
> 8. The bidder agrees to keep such records and file such reports relating to the provisions of this order as shall be required by the contracting or administering agency."

In November, 1969, the General State Authority of the Commonwealth of Pennsylvania issued invitations to bid for the construction of an earth dam on Marsh Creek in Chester County, Pennsylvania. Although this dam is a Commonwealth project, part of the construction cost, esti-

mated at over $3,000,000 is to be funded by federal monies under a program administered by the Department of Agriculture.[9] The Secretary of Agriculture, one of the federal defendants, as a condition for payment of federal financial assistance for the project, required the inclusion in each bid of a Philadelphia Plan Commitment in compliance with the order of September 23, 1969. On November 14, 1969, the General State Authority issued an addendum to the original invitation for bids requiring all bidders to include such a commitment in their bids. It is alleged and not denied that except for the requirement by the Secretary of Agriculture that the Philadelphia Plan Commitment be included, the General State Authority would not have imposed such a requirement on bidders.

The Association consists of more than eighty contractors in the five-county Philadelphia area who regularly employ workers in the six specified crafts, and who collectively perform more than $150,000,000 of federal and federally assisted construction in that area annually. Each of the contractor plaintiffs is a regular bidder on federal and federally assisted construction projects. The complaint was filed prior to the opening of bids on the Marsh Creek dam. It sought injunctive relief against the inclusion of a Philadelphia Plan Commitment requirement in the invitation for bids. By virtue of a stipulation that the General State Authority would issue a new and superseding invitation for bids if the district court held the Plan to be unlawful, the parties agreed that bids could be received without affecting the justiciability of the controversy. Bids were received on January 7, 1970. One of the intervening contractor plaintiffs submitted a low bid and appeared at the time of the district court decision to be entitled to an award of the contract.

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9. Federal assistance was authorized under the Watershed Protection and Flood Prevention Act, 16 U. S. C. § 1001 et seq.

The complaints of the Association and the contractors refer to the fact that the Comptroller General of the United States has opined that the Philadelphia Plan Commitment is illegal and that disbursement of federal funds for the performance of a contract containing such a promise will be treated as unlawful.[10] The plaintiffs point out that the withholding of funds after a contractor has commenced performance would have catastrophic consequences, since contractors depend upon progress payments, and are in no position to complete their contracts without such payments. They allege that the Philadelphia Plan is illegal and void for the following reasons:

1. It is action by the Executive branch not authorized by the constitution or any statute and beyond Executive power.

2. It is inconsistent with Title VII of the Civil Rights Act of 1964.[11]

3. It is inconsistent with Title VI of the Civil Rights Act of 1964.[12]

4. It is inconsistent with the National Labor Relations Act.[13]

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10. Comp. Gen. Op., Letter to Sec. of Labor George P. Shultz, August 5, 1969, 115 Cong. Rec. 17,201-04 (daily ed. Dec. 18, 1969). The Comptroller General had objected to earlier efforts at implementing the "affirmative action" aspect of Exec. Order No. 11246 on the ground that these plans failed to inform prospective bidders of definite minimum standards for acceptable programs. In his negative opinion letter in response to the original Philadelphia Pre-Award Plan, he had also adverted to the possibility of conflict with Title VII of the Civil Rights Act of 1964. See note 7 supra. The Title VII objections became the heart of the opinion of August 5, 1969 which challenged the validity of the Revised Philadelphia Plan.

11. 42 U. S. C. § 2000(e) et seq.

12. 42 U. S. C. § 2000(d) et seq.

13. 29 U. S. C. § 151 et seq.

5. It is substantively inconsistent with and was not adopted in procedural accordance with Executive Order No. 11246.

6. It violate the process because
   a) it requires contradictory conduct impossible of consistent attainment;

   b) it unreasonably requires contractors to undertake to remedy an evil for which the craft unions, not they, are responsible;

   c) it arbitrarily and without basis in fact singles out the five-county Philadelphia area for discriminatory treatment without adequate basis in fact or law; and

   d) it requires quota hiring in violation of the Fifth Amendment.

The federal defendants moved both to dismiss the complaint under Rule 12(b)(1), Fed. R. Civ. P. and for summary judgment under Rule 56(b) Fed. R. Civ. P. They asserted that the plaintiffs lacked standing and that they were entitled to judgment as a matter of law. The plaintiffs moved for summary judgment. The district court held that the Association lacked standing to maintain the suit, that the Contractors had such standing, and that the Plan was valid. It granted summary judgment for the federal defendants, and the plaintiffs appeal.

Standing

The district court's holding that the Association lacked standing to sue was handed down prior to that of the Supreme Court in *Association of Data Processing Service Orgs., Inc. v. Camp,* 397 U. S. 150 (1970), and in the light of that decision and the more recent decision in *Citizens to Preserve Overton Park, Inc. v. Volpe,* 39 U. S. L. W. 4287

(U. S. March 2, 1971), is at least doubtful. We need not reach this issue, however, since the Contractor plaintiffs who as bidders are directly impacted by the requirement that they agree in their bid to comply with the Plan, clearly have standing. *Abbott Laboratories v. Gardner,* 387 U. S. 136 (1967). All plaintiffs have been represented by the same attorney, and the presence or absence of the Association as a plaintiff has no practical significance.

Executive Power

The plaintiffs contend that the Philadelphia Plan is social legislation of local application enacted by the Executive without the benefit of statutory or constitutional authority. They point out, probably correctly, that the Plan imposes on the successful bidder on a project of the Commonwealth of Pennsylvania record keeping and hiring practices which violate Pennsylvania law.[14] If the Plan was adopted pursuant to a valid exercise of Presidential power its provisions would, of course, control over local law. See *United States v. City of Chester,* 144 F. 2d 415, 420 (3d Cir. 1944); cf. *United States v. Allegheny County,* 322 U. S. 174, 183 (1944); *Panhandle Oil Co. v. Knox,* 277 U. S. 218, 221 (1928). But, say the plaintiffs, where there is neither statutory authorization nor constitutional authority for the

14. The Pennsylvania Human Relations Act, 43 P. S. § 951 et seq. (Supp. 1970), specifically prohibits an employer from keeping any record of or using any form of application with respect to the race, color, religion, ancestry, sex or national origin of an applicant for employment. 43 P. S. § 955(b)(1). The Act also prohibits the use of a quota system for employment based on the same criteria. 43 P. S. § 955(b)(3). The record keeping prohibition may be of limited force due to certain requirements of Title VII of the Civil Rights Act of 1964. 42 U. S. C. § 2000(e)-8(c). Moreover, we do not know how the Pennsylvania courts or the Pennsylvania Human Relations Commission would react to a scheme of "benign" quota hiring.

Executive action, no substantive federal requirements may be imposed upon a contract between the Commonwealth and its contractor.

The district court's answer is that the federal government "has the unrestricted power to fix the terms, conditions and those with whom it will deal."[15] For this proposition it cites *Perkins v. Lukens Steel Co.*, 310 U. S. 113 (1940) and *King v. Smith*, 392 U. S. 309, 333 (1968). Neither case is in point, however on the issue of Executive as distinguished from federal power. *King v. Smith* held that the Alabama substitute father regulation was inconsistent with the Social Security Act, 42 U. S. C. § 606(a), and points out that the federal government may impose the terms and conditions upon which its money allotments may be disbursed. The conditions referred to were imposed by Congress, not by the Executive branch. *Perkins v. Lukens Steel Co.* interprets the Public Contracts Act of June 30, 1936[16] which requires that sellers to the federal government pay prevailing minimum wages. It holds that an administrative determination of prevailing wages in a given industry made by the Secretary of Labor is not subject to judicial review on behalf of a potential seller.[17] The opinion contains the language:

> "Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases."[18]

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15. 311 F. Supp. 1002, 1011 (E. D. Pa. 1970).

16. 49 Stat. 2036-39, 41 U. S. C. §§ 35-45.

17. The actual holding of *Perkins* was subsequently nullified by Congress, 66 Stat. 308 (1952), 41 U. S. C. § 43(a). See 4 K. Davis, Administrative Law § 28.06 (1958).

18. 310 U. S. at 127.

The quoted language refers to federal power exercised pursuant to a statutory mandate. The case is not in point on the issue of Executive power absent such a mandate.

The federal defendants and several amici [19] contend that Executive power to impose fair employment conditions incident to the power to contract has been upheld in this Circuit and in the Fifth Circuit. They cite *Farmer v. Philadelphia Electric Company*, 329 F. 2d 3 (3d Cir. 1964) and *Farkas v. Texas Instrument, Inc.*, 375 F. 2d 629 (5th Cir.), cert. denied, 389 U. S. 977 (1967). Both cases discussed the Executive Order program for achieving fair employment in the context of Government contracts rather than federally assisted state contracts, and both assumed the validity of the Executive Order then applicable.[20] Both cases held that even assuming the validity of the Executive Order, it did not give rise to a private cause of action for damages by a party subjected to discrimination. Discussion of the validity of the Executive Order was in each case dictum. Moreover, both *Farmer* and *Farkas* refer to 40 U. S. C. § 486(a) as the source of the Executive power to issue the order. That subsection authorizes the President to prescribe such policies and directives as he deems necessary to effectuate the provisions of Chapter 10 of Title 40 [21] and Chapter 4 of Title 41.[22] These chapters deal with procurement of Govern-

19. Amici favoring the Plan include the City of Philadelphia, the Urban League of Philadelphia, Wives for Equal Employment Opportunity, the Lawyers' Committee for Civil Rights Under Law, and the N. A. A. C. P. Appearing as amici in opposition to the Plan are the Building and Construction Trades Dep't, AFL-CIO, the Building and Construction Trades Council of Philadelphia and Vicinity, AFL-CIO, the General Building Contractors Ass'n, Inc., the National Electrical Contractors Ass'n, and the Associated General Contractors of America.

20. Exec. Order No. 10925, 26 Fed. Reg. 1977 (March 6, 1961), 3 C. F. R., 1961 Comp. 86.

21. Management and Disposal of Government Property.

22. Procurement Procedures.

ment property and services, not with federal assistance programs. Thus even if *Farmer* and *Farkas* were holdings rather than dicta as to Executive power, the holdings would not reach the instant case. The validity of the Executive Order program as applied to the construction industry in state government contracts by virtue of federal assistance has not been litigated, so far as we have been able to determine, in any case reaching the courts of appeals.[23] Certainly no case has arisen which considers Executive power to impose, by virtue of federal assistance, contract terms in a state construction contract which are at variance with state law.

The limitations of Executive power have rarely been considered by the courts. One of those rare instances is *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U. S. 579 (1952). From the six concurring opinions and one dissenting opinion in that case, the most significant guidance for present purposes may be found in that of Justice Jackson:

> "We may well begin by a somewhat oversimplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.
>
> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that

23. But cf. *Weiner v. Cuyahoga Community College,* 19 Ohio St. 2d 35, 249 N. E. 2d 907 (1969), cert. denied, 396 U. S. 1004 (1970); *Ethridge v. Rhodes;* 268 F. Supp. 83 (S. D. Ohio 1967).

the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily on any who might attack it.

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[24]

Plaintiffs contend that the Philadelphia Plan is inconsistent with the will of Congress expressed in several statutes. We deal with these statutory contentions herein-

24. 343 U. S. at 635-38 (footnotes omitted).

after. Thus for the moment we may set to one side consideration of Justice Jackson's third category, and turn to category (1), action expressly or impliedly authorized, and category (2), action in which the President has implied power to act in the absence of congressional preemption. To determine into which category the Philadelphia Plan falls a review of Executive Orders in the field of fair employment practices is helpful.

The first such order, Executive Order No. 8802,[25] was signed by President Roosevelt on June 25, 1941. It established in the Office of Production Management a Committee on Fair Employment Practice, and it required that all Government contracting agencies include in all defense contracts a covenant not to discriminate against any worker because of race, creed, color, or national origin. The order contained no specific statutory reference, and describes the action "as a prerequisite to the successful conduct of our national defense production effort." In December 1941 Congress enacted "An Act to Expedite the Prosecution of the War Effort,"[26] and on December 27, 1941, pursuant to that Act the President issued Executive Order No. 9001[27] which granted to the War and Navy Department and the Maritime Commission broad contracting authority. This order among other provisions stated that a non-discrimination clause would be deemed incorporated by reference in all such contracts. On May 27, 1943, Executive Order No. 8802 was amended by Executive Order No. 9346[28] which established in the Office for Emergency Management of the Executive Office of the President a Committee on Fair Employment Practice. This order required the antidiscrimination clause in all government con-

25. 6 Fed. Reg. 3109, 3 C. F. R., 1938-43 Comp. 957.
26. Act of Dec. 18, 1941, ch. 593, 55 Stat. 838.
27. 6 Fed. Reg. 6787, 3 C. F. R. 1938-43 Comp. 1054.
28. 8 Fed. Reg. 7183, 3 C. F. R. 1938-43 Comp. 1280.

tracts rather than in defense contracts only. Still, the order was quite clearly bottomed on the President's war mobilization powers and was by its terms directed toward enhancing the pool of workers available for defense production.

On December 18, 1945, President Truman signed Executive Order No. 9664,[29] which continued the Committee established by Executive Orders Nos. 8802 and 9346 "for the periods and subject to the conditions stated in the National War Agencies Appropriation Act, 1946 (Public Law 156, 79th Cong., 1st Sess., approved July 17, 1945)." On February 2, 1951, the President signed Executive Order No. 10210,[30] which transferred to the Department of Defense the contracting powers referred to in Executive Order No. 9001. The order continued the provision that a non-discrimination clause would be deemed incorporated by reference in all defense contracts. It referenced the First War Powers Act, 1941, as amended. By a subsequent series of Executive Orders Executive Order No. 10210 was extended to other government agencies engaged in defense related procurement.[31] On December 3, 1951 the President signed Executive Order No. 10308,[32] creating the Committee on Government Contract Compliance, which was charged with the duty of obtaining compliance with the non-discrim-

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29. 10 Fed. Reg. 15301, 3 C. F. R., 1943-48 Comp. 480.

30. 15 Fed. Reg. 1049, 3 C. F. R., 1949-53 Comp. 390.

31. Exec. Order No. 10216, 16 Fed. Reg. 1815 (Feb. 23, 1951), 3 C. F. R., 1949-53 Comp. 732 (Department of Agriculture, Atomic Energy Commission, National Advisory Committee for Aeronautics, and Government Printing Office); Exec. Order No. 10227, 16 Fed. Reg. 2675 (Mar. 24, 1951), 3 C. F. R., 1949-53 Comp. 739 (General Services Administration); Exec. Order No. 10231, 16 Fed. Reg. 3025 (April 5, 1951), 3 C. F. R., 1949-53 Comp. 741 (Tennessee Valley Authority); Exec. Order No. 10243, 16 Fed. Reg. 4419 (May 17, 1951), 3 C. F. R., 1949-53 Comp. 752 (Federal Civil Defense Administration); Exec. Order No. 10281, 16 Fed. Reg. 8789 (Aug. 28, 1951), 3 C. F. R., 1949-53 Comp. 781 (Defense Materials Procurement Agency).

32. 16 Fed. Reg. 12303, 3 C. F. R., 1949-53 Comp. 837.

ination contract provisions. The statutory authorities referenced in Executive Order No. 10308 are the Defense Production Act of 1950 [33] and 31 U. S. C. § 691.[34] Reference to the Defense Production Act of 1950 shows that the President was still acting, pursuant to his national defense powers, to assure maximum utilization of available manpower.

President Eisenhower on August 13, 1953, by Executive Order No. 10479 [35] revoked Executive Order No. 10308 and transferred the compliance functions of the Committee on Government Contract Compliance to the Government Contract Committee.[36] In this order for the first time there is no mention of defense production. For the first time the Committee is authorized to receive complaints of violations,[37] and to conduct activities not directly related to federal procurement.[38] On September 3, 1954, by Executive Order

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33. 60 U. S. C. App. § 2061 et seq.

34. This latter reference is to the source of appropriations for salaries and expenses for committee members and staff. It appears in numerous subsequent Executive Orders, but has no significance other than fiscal.

35. 18 Fed. Reg. 4899, 3 C. F. R., 1949-53 Comp. 961.

36. The new committee was composed of 15 members, 9 named by the President and one representative each from the Atomic Energy Commission, the Department of Commerce, the Department of Defense, the Department of Justice, the Department of Labor, and the General Services Administration. Id. § 3, as amended by Exec. Order No. 10482, 18 Fed. Reg. 4944 (Aug. 15, 1953), 3 C. F. R., 1949-53 Comp. 968.

37. Id. § 5.

38. "Sec. 6. The Committee shall encourage the furtherance of an educational program by employer, labor, civic, educational, religious, and other voluntary nongovernmental groups in order to eliminate or reduce the basic causes and costs of discrimination in employment.

"Sec. 7. The Committee is authorized to establish and maintain cooperative relationships with agencies of state and local governments, as well as with nongovernmental bodies, to assist in achieving the purposes of this order."

Id. §§ 6, 7.

No. 10557 [39] the required form of Government contract provision was revised. The new provision was much more specific, required the imposition of the contractor's obligation on his subcontractors, and required the posting of appropriate notices. The Eisenhower orders, while they did not refer to defense production and did authorize the Compliance Committee to encourage non-discrimination outside the field of Government contracts, were still restricted in direct application to federal government procurement. While the orders do not contain any specific statutory reference other than the appropriations statute, 31 U. S. C. § 690, they would seem to be authorized by the broad grant of procurement authority with respect to Titles 40 and 41.[40] No less than in the case of defense procurement it is in the interest of the United States in all procurement to see that its suppliers are not over the long run increasing its costs and delaying its programs by excluding from the labor pool available minority workmen. In the area of Government procurement Executive authority to impose non-discrimination contract provisions falls in Justice Jackson's first category: action pursuant to the express or implied authorization of Congress.

Exec. Order No. 10925 [41] signed by President Kennedy on March 6, 1961, among other things enlarged the notice requirements and specified that the President's Committee on Equal Employment Opportunity could by rule, regulation or order impose sanctions for violation. Coverage still extended only to federal government contracts. Significantly for purposes of this case, however, the required contract language was amended to add the provision:

> "The Contractor will take affirmative action to ensure that applicants are employed, and that employees are

39. 19 Fed. Reg. 5655, 3 C. F. R., 1954-58 Comp. 203.
40. See 40 U. S. C. § 486(a).
41. 26 Fed. Reg. 1977, 3 C. F. R., 1959-63 Comp. 448.

> treated during employment, without regard to their race, creed, color, or national origin."[42]

The Philadelphia Plan is simply a refined approach to this "affirmative action" mandate. Applied to federal procurement the affirmative action clause is supported by the same Presidential procurement authority that supports the non-discrimination clause generally.

The most significant change in the Executive Order program for present purposes occurred on June 22, 1963 when the President signed Executive Order No. 11114,[43] which amended Executive Order No. 10925 by providing that the same non-discrimination contract provisions heretofore required in all federal procurement contracts must also be included in all federally assisted construction contracts. By way of Executive Order No. 11246[44] issued in 1965, President Johnson transferred to the Secretary of Labor the functions formerly specified in Executive Order Nos. 10925 and 11114, and he continued both the affirmative action requirement and the coverage of federally assisted construction contracts.

While all federal procurement contracts must include an affirmative action covenant,[45] the coverage on federally assisted contracts has been extended to construction contracts only. This choice is significant, for it demonstrates that the Presidents were not attempting by the Executive Order program merely to impose their notions of desirable

42. Id., pt. III, § 301(1).

43. 28 Fed. Reg. 6485, 3 C. F. R., 1959-63 Comp. 774.

44. See note 4 supra.

45. Section 204 of Exec. Order No. 11246 provides that the Secretary of Labor may exempt certain contracts and purchase orders from the requirements of the order because of special circumstances in the national interest and that he may by rule or regulation exempt certain classes of contracts (1) to be performed outside the United States, (2) for standard commercial supplies or raw materials, (3) involving insubstantial amounts of money or workers, or (4) involving subcontracts below a specified tier.

social legislation on the states wholesale. Rather, they acted in the one area in which discrimination in employment was most likely to affect the cost and the progress of projects in which the federal government had both financial and completion interests. In direct procurement the federal government has a vital interest in assuring that the largest possible pool of qualified manpower be available for the accomplishment of its projects. It has the identical interest with respect to federally assisted construction projects. When the Congress authorizes an appropriation for a program of federal assistance, and authorizes the Executive branch to implement the program by arranging for assistance to specific projects, in the absence of specific statutory regulations it must be deemed to have granted to the President a general authority to act for the protection of federal interests. In the case of Executive Order Nos. 11246 and 11114 three Presidents have acted by analogizing federally assisted construction to direct federal procurement. If such action has not been authorized by Congress (Justice Jackson's first category), at the least it falls within the second category. If no congressional enactments prohibit what has been done, the Executive action is valid. Particularly is this so when Congress, aware of Presidential action with respect to federally assisted construction projects since June of 1963, has continued to make appropriations for such projects. We conclude, therefore, that unless the Philadelphia Plan is prohibited by some other congressional enactment, its inclusion as a pre-condition for federal assistance was within the implied authority of the President and his designees. We turn, then to a consideration of the statutes on which plaintiffs rely.

The Civil Rights Act of 1964

Plaintiffs suggest that by enacting Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e et seq., which deals

comprehensively with discrimination in employment, Congress occupied the field. The express reference in that statute to Executive Order No. 10925 or any other Executive Order prescribing fair employment practices for Government contractors, 42 U. S. C. § 2000e-8(d), indicates, however, that Congress contemplated continuance of the Executive Order program. Moreover we have held that the remedies established by Title VII are not exclusive. *Young v. International Telephone & Telegraph Co.*, —F. 2d — (3d Cir. 1971).

But while Congress has not prohibited Presidential action in the area of fair employment on federal or federally assisted contracts, the Executive is bound by the express prohibitions of Title VII. The argument most strenuously advanced against the Philadelphia Plan is that it requires action by employers which violates the Act. Plaintiffs point to § 703(j), 42 U. S. C. § 2000e-2(j):

> "Nothing contained in this subchapter shall be interpreted to require any employer . . . [or] labor organization . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or groups on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . employed . . . in comparison with the total number or percentage of persons of such race . . . in the available work force in any community . . . or other area."

The Plan requires that the contractor establish specific goals for utilization of available minority manpower in six trades in the five-county area. Possibly an employer could not be compelled, under the authority of Title VII, to embrace such a program, although § 703(j) refers to percentages of minorities in an area work force rather than per-

centages of minority tradesmen in an available trade work force. We do not meet that issue here, however, for the source of the required contract provision is Executive Order No. 11246. Section 703(j) is a limitation only upon Title VII, not upon any other remedies, state or federal.

Plaintiffs, and more particularly the union amici, contend that the Plan violates Title VII because it interferes with a bona fide seniority system. Section 703(h), 42 U. S. C. § 2000(e)-2(h), provides:

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to employ different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . ."

The unions, it is said, refer men from the hiring halls on the basis of seniority, and the Philadelphia Plan interferes with this arrangement since few minority tradesmen have high seniority. Just as with § 703(j), however, § 703(h) is a limitation only upon Title VII, not upon any other remedies.[46]

Plaintiffs contend that the Plan, by imposing remedial quotas, requires them to violate the basic prohibitions of Section 703(a), 42 U. S. C. § 2000(e)-2(a):

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46. This same subsection refers to ability tests. The Supreme Court recently in *Griggs v. Duke Power Co.*, 39 U. S. L. W. 4317 (U. S. Mar. 8, 1971) considered the extent to which such tests are permissible. The Court said:

> "But Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." 39 U. S. L. W. at 4319.

It held that the tests must be job related. Nor can seniority make permanent the effects of past discrimination. *Local 189, United Papermakers & Paperworkers v. United States*, 416 F. 2d 980 (5th Cir. 1969), cert. denied, 397 U. S. 919 (1970); *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E. D. Va. 1968).

> "It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire . . . any individual . . . because of such individual's race . . . or
>
> (2) to . . . classify his employees in any way which would deprive . . . any individual of employment opportunities . . . because of such individual's race . . ."

Because the Plan requires that the contractor agree to specific goals for minority employment in each of the six trades and requires a good faith effort to achieve those goals, they argue, it requires (1) that they refuse to hire some white tradesmen, and (2) that they classify their employees by race, in violation of § 703(a). This argument rests on an overly simple reading both of the Plan and of the findings which led to its adoption.

The order of September 23, 1969 contained findings that although overall minority group representation in the construction industry in the five-county Philadelphia area was thirty per cent, in the six trades representation was approximately one per cent. It found, moreover, that this obvious underrepresentation was due to the exclusionary practices of the unions representing the six trades. It is the practice of building contractors to rely on union hiring halls as the prime source for employees. The order made further findings as to the availability of qualified minority tradesmen for employment in each trade, and as to the impact of an affirmative action program with specific goals upon the existing labor force. The Department of Labor found that contractors could commit to the specific employment goals "without adverse impact on the existing labor force." Some minority tradesmen could be recruited, in other words, without eliminating job opportunities for white tradesmen.

To read Section 703(a) in the manner suggested by the plaintiffs we would have to attribute to Congress the intention to freeze the status quo and to foreclose remedial action under other authority designed to overcome existing evils. We discern no such intention either from the language of the statute or from its legislative history. Clearly the Philadelphia Plan is color-conscious. Indeed the only meaning which can be attributed to the "affirmative action" language which since March of 1961 has been included in successive Executive Orders is that Government contractors must be color-conscious. Since 1941 the Executive Order program has recognized that discriminatory practices exclude available minority manpower from the labor pool. In other contexts color-consciousness has been deemed to be an appropriate remedial posture. *Porcelli v. Titus,* 302 F. Supp. 726 (D. N. J. 1969) aff'd, 431 F. 2d 1254 (3d Cir. 1970), *Norwalk CORE v. Norwalk Redevelopment Agency,* 395 F. 2d 920, 931 (2d Cir. 1968); *Offermann v. Nitkowski,* 378 F. 2d 22, 24 (2d Cir. 1967). It has been said respecting Title VII that "Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act." *Quarles v. Philip Morris, Inc., supra,* 279 F. Supp. at 514. The *Quarles* case rejected the contention that existing, nondiscriminatory seniority arrangements were so sanctified by Title VII that the effects of past discrimination in job assignments could not be overcome.[47] We reject the contention that Title VII prevents the President acting through the Executive Order program from attempting to remedy the absence from the

47. The federal courts in overcoming the effects of past discrimination are expressly authorized in Title VII to take affirmative action. 42 U. S. C. § 2000(e)-5(g). See *Vogler v. McCarty,* 294 F. Supp. 368 (E. D. La. 1968), aff'd *sub. nom. International Ass'n Heat & Frost I. & A Wkrs. v. Vogler,* 407 F. 2d 1047 (5th Cir. 1969).

Philadelphia construction labor of minority tradesmen in key trades.

What we have said about Title VII applies with equal force to Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000(d) et seq. That Title prohibits racial and other discrimination in any program or activity receiving federal financial assistance.[48] This general prohibition against discrimination cannot be construed as limiting Executive authority in defining appropriate affirmative action on the part of a contractor.

We hold that the Philadelphia Plan does not violate the Civil Rights Act of 1964.

The National Labor Relations Act

The June 27, 1969 order, par. 8(b) provides:

> "It is no excuse that the union with which the contractor has a collective bargaining agreement failed to refer minority employees. Discrimination in referral for employment, even if pursuant to provisions of a collective bargaining agreement, is prohibited by the National Labor Relations Act and the Civil Rights Act of 1964. It is the longstanding uniform policy of OFCC that contractors and subcontractors have a responsibility to provide equal employment opportunity if they want to participate in federally involved contracts. To the extent they have delegated the responsibility for some of their employment practices to some other organization or agency which prevents them from meeting their obligations pursuant to Executive

48. Section 604 of Title VI, 42 U. S. C. § 2000(d)-3, states that nothing in the Title authorizes agency action under the Title with respect to employment practices of any employer, except where federal assistance is primarily aimed at providing employment. However, since the Philadelphia Plan does not purport to derive its authorization from Title VI, this section does not affect its validity.

> Order 11246, as amended, such contractors cannot be considered to be in compliance with Executive Order 11246, as amended, or the implementing rules, regulations and orders."

The union amici vigorously contend that the Plan violates the National Labor Relations Act by interfering with the exclusive union referral systems to which the contractors have in collective bargaining agreements bound themselves. Exclusive hiring hall contracts in the building and construction industry are validated by Section 8(f) of the National Labor Relations Act, 29 U. S. C. § 158(f). In *Teamsters Local 357 v. NLRB*, 365 U. S. 667 (1961), the Supreme Court held that the National Labor Relations Board could not proscribe exclusive hiring hall agreements as illegal per se since Congress had not chosen to prohibit hiring halls. It is argued that the President is attempting to do what the Supreme Court said the National Labor Relations Board could not do—prohibit a valid hiring hall agreement. Of course collective bargaining agreements which perpetuate the effects of past discrimination are unlawful under Title VII, *Local 189, United Papermakers & Paperworkers v. United States, supra; United States v. Sheet Metal Workers, Local 36*, 416 F. 2d 123, 132 (8th Cir. 1969). The findings of past discrimination which justified remedial action in these cases were made in judicial proceedings, however. See 42 U. S. C. § 2000e-5(g). The amici contend that the Assistant Secretary's nonjudicial finding of prior exclusionary practices is insufficient to support the Plan's implied requirement that the contractor look to other sources for employees if the unions fail to refer sufficient minority group members.

It is clear that while hiring hall arrangements are permitted by federal law they are not required. Nothing in the National Labor Relations Act purports to place any

limitation upon the contracting power of the federal government. We have said hereinabove that in imposing the affirmative action requirement on federally assisted construction contracts the President acted within his implied contracting authority. The assisted agency may either agree to do business with contractors who will comply with the affirmative action covenant, or forego assistance. The prospective contractors may either agree to undertake the affirmative action covenant, or forego bidding on federally assisted work. If the Plan violates neither the Constitution nor federal law, the fact that its contractual provisions may be at variance with other contractual undertakings of the contractor is legally irrelevant. Factually, of course, that variance is quite relevant. Factually it is entirely likely that the economics of the marketplace will produce an accommodation between the contract provisions desired by the unions and those desired by the source of the funds. Such an accommodation will be no violation of the National Labor Relations Act.

The absence of a judicial finding of past discrimination is also legally irrelevant. The Assistant Secretary acted not pursuant to Title VII but pursuant to the Executive Order. Regardless of the cause, exclusion from the available labor pool of minority tradesmen is likely to have an adverse effect upon the cost and completion of construction projects in which the federal government is interested. Even absent a finding that the situation found to exist in the five-county area was the result of deliberate past discrimination, the federal interest in improving the availability of key tradesmen in the labor pool would be the same. While a court must find intentional past discrimination before it can require affirmative action under 42 U. S. C. § 2000e-5(g), that section imposes no restraint upon the measures which the President may require of the beneficiaries of federal assistance. The decision of his designees

as to the specific affirmative action which would satisfy the local situation did not violate the National Labor Relations Act and was not prohibited by 42 U. S. C. § 2000e-5(g).

Consistency with Executive Order No. 11246

The plaintiffs argue that the affirmative action mandate of § 202 of Executive Order No. 11246 is limited by the more general requirement in the same section, "The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin." They contend that properly construed the affirmative action referred to means only policing against actual present discrimination, not action looking toward the employment of specific numbers of minority tradesmen.

Section 201 of the Executive Order provides:

> "The Secretary of Labor shall be responsible for the administration of Parts II [government contracts] and III [Federal assistance] of this Order and shall adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof."

Acting under this broad delegation of authority the Labor Department in a series of orders of local application made it clear that it interpreted "affirmative action" to require more than mere policing against actual present discrimination.[49] Administrative action pursuant to an Executive Order is invalid and subject to judicial review if beyond the scope of the Executive Order. *Peters v. Hobby*, 349 U. S. 331 (1955). But the courts should give more than

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49 See United States Commission on Civil Rights. The Federal Civil Rights Enforcement Effort at 167-72 (1970).

ordinary deference to an administrative agency's interpretation of an Executive Order or regulation which it is charged to administer. *Udall v. Tallman,* 380 U. S. 1 (1965); *Bowles v. Seminole Rock & Sand Co.,* 325 U. S. 410, 413 (1945). The Attorney General has issued an opinion that the Philadelphia Plan is valid,[50] and the President has continued to acquiesce in the interpretation of the Executive Order made by his designee. The Labor Department interpretation of the affirmative action clause must, therefore, be deferred to by the courts.

Plaintiffs also contend that the signing of the June 27, 1969 and September 23, 1969 orders by an assistant secretary rather than by the Secretary of Labor makes those orders procedurally invalid. Here they rely on § 401 which provides:

> "The Secretary of Labor may delegate to any officer, agency, or employee in the Executive branch of the Government, any function or duty of the Secretary under Parts II and III of this Order, except authority to promulgate rules and regulations of a general nature."

The Plan, they say, is a rule or regulation of a general nature, and could have been issued only by the Secretary. In the first place the Plan is not general. It is based upon findings as to the available construction manpower in a specific labor market. Moreover, the interpretation of § 401 made by the administrator requires the same deference from the courts as is required toward his other interpretations of the order. We will not second guess his delegation to the Assistant Secretary of the duty of enforcing the affirmative action covenant.

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50. Att'y Gen. Op., Letter to Sec. of Labor Schultz, Sept. 22, 1969, 115 Cong. Rec. 17.204-06 (daily ed. Dec. 18, 1969).

The Due Process Contentions

Plaintiffs urge that the Plan violates the Due Process Clause of the Fifth Amendment in several ways.

First, they allege that it imposes on the contractors contradictory duties impossible of attainment. This impossibility arises, they say, because the Plan requires both an undertaking to seek achievement of specific goals of minority employment and an undertaking not to discriminate against any qualified applicant or employee, and because a decision to hire any black employee necessarily involves a decision not to hire a qualified white employee. This is pure sophistry. The findings in the September 23, 1969 order disclose that the specific goals may be met, considering normal employee attrition and anticipated growth in the industry, without adverse effects on the existing labor force. According to the order the construction industry has an essentially transitory labor force and is often in short supply in key trades. The complaint does not allege that these findings misstate the underlying facts.

Next the plaintiffs urge that the Plan is arbitrary and capricious administrative action, in that it singles out the contractors and makes them take action to remedy the situation created by acts of past discrimination by the craft unions. They point to the absence of any proceedings under Title VII against the offending unions, and urge that they are being discriminated against. This argument misconceives the source of the authority for the affirmative action program. Plaintiffs are not being discriminated against. They are merely being invited to bid on a contract with terms imposed by the source of the funds. The affirmative action covenant is no different in kind than other covenants specified in the invitation to bid. The Plan does not impose a punishment for past misconduct. It exacts a covenant for present performance.

Some amici urge that selection of the five-county Philadelphia area was arbitrary and capricious and without basis in fact. The complaint contains a conclusive allegation to this effect. No supporting facts are alleged. It is not alleged, for example, that the specific goals for minority manpower utilization would be different if more or fewer counties were to be included in the September 23, 1969 order. The union amici do question the findings made by the Assistant Secretary of Labor, but the complaint, fairly read, does not put these findings in issue. We read the allegation with respect to the five-county area as putting in issue the legal authority of the Secretary to impose a specific affirmative action requirement in any separate geographic area. The simple answer to this contention is that federally assisted construction contracts are performed at specific times and in specific places. What is appropriate affirmative action will vary according to the local manpower conditions prevailing at the time.

Finally, the plaintiffs urge that the specific goals specified by the Plan are racial quotas prohibited by the equal protection aspect of the Fifth Amendment. See *Shapiro v. Thompson,* 394 U. S. 618, 641-42 (1969); *Schneider v. Rush,* 377 U. S. 163 (1964); *Bolling v. Sharpe,* 347 U. S. 497 (1954). The Philadelphia Plan is valid Executive action designed to remedy the perceived evil that minority tradesmen have not been included in the labor pool available for the performance of construction projects in which the federal government has a cost and performance interest. The Fifth Amendment does not prohibit such action.

One final point. The plaintiffs contend that although there were cross-motions for summary judgment the district court, while it should have entered summary judgment in their favor, could not properly enter summary judgment against them. Several amici press this point on

appeal even more strenuously than do plaintiffs. They contend that neither the finding of past discrimination by the craft unions made in the June 27, 1969 order nor the statistical findings as to availability of minority tradesmen, employee attrition, and industry growth made in the September 23, 1969 order should be accepted as true.

The federal defendants conceded in the district court that the affidavit of Mr. Macaluso, to which copies of both orders were attached, was offered not for the truth of the underlying facts but only to identify the orders. This concession was not significant for the decisions on the motions under Rule 12(b)(1) and Rule 56(b). The complaint to which the motions by the federal defendants was addressed nowhere challenges the factual underpinnings of the specific goals set forth in the September 23, 1969 order. Rather the complaint makes a legal attack upon the power of the Department of Labor to impose these goals as contractual commitments. Read generously, the complaint can be construed to challenge the administrative procedures followed by the Assistant Secretary in determining these goals. We have dealt hereinabove with that challenge insofar as it questions compliance with the procedures specified in Executive Order No. 11246. Insofar as the complaint challenges on broader administrative law grounds the method by which the Assistant Secretary assembled the data for the September 23, 1969 order, we hold that public hearings after notice were an appropriate means for the administrative agency to obtain the information needed for informed judgment. Cf. *Shannon v. Department of Housing & Urban Development*, — F. 2d — (3d Cir. 1971). No public hearing was held prior to the issuance of the June 27, 1969 order, which contains the Assistant Secretary's finding of past exclusionary union practices. He relied upon published data, however, which itself may have been sufficient to justify administrative action leading

to the specification of contract provisions. We need not decide that issue, however, for in our view the data in the September 23, 1969 order revealing the percentages of utilization of minority group tradesmen in the six trades compared with the availability of such tradesmen in the five-county area, justified issuance of the order without regard to a finding as to the cause of the situation. The federal interest is in maximum availability of construction tradesmen for the projects in which the federal government has a cost and completion interest. A finding as to the historical reason for the exclusion of available tradesmen from the labor pool is not essential for federal contractual remedial action.

The judgment of the district court will be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19,027

THE CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA

v.

THE SECRETARY OF LABOR, GEORGE P. SHULTZ; THE ASSISTANT SECRETARY OF LABOR, ARTHUR A. FLETCHER; THE DIRECTOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE, JOHN L. WILKS; THE SECRETARY OF AGRICULTURE, CLIFFORD M. HARDIN; AND THE GENERAL STATE AUTHORITY OF THE COMMONWEALTH OF PENNSYLVANIA

JAMES D. MORRISSEY, INC.; THE CONDUIT & FOUNDATION CORP.; GLASGOW, INC.; BUCKLEY & COMPANY; THE NYLEVE COMPANY; ERB ENGINEERING & CONSTR. CO.; PERKINS, KANAK, FOSTER, INC.; AND LANSDOWNE CONSTRUCTORS, INC. (INTERVENING PLAINTIFFS IN D. C.),

THE CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, JAMES D. MORRISSEY, INC., THE CONDUIT & FOUNDATION CORP., GLASGOW, INC., BUCKLEY & COMPANY, THE NYLEVE COMPANY, ERB ENGINEERING & CONSTR. CO., PERKINS, KANAK, FOSTER, INC., AND LANSDOWNE CONSTRUCTORS, INC.,

Appellants

(D. C. Civil Action No. 70-18)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: HASTIE, *Chief Judge* and MCLAUGHLIN and GIBBONS, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed March 13, 1970 be, and the same is hereby affirmed, with costs taxed in favor of appellees.

ATTEST:

THOMAS F. QUINN,
Clerk.

April 22, 1971.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 70-18.

THE CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA,

Plaintiff,

and

JAMES D. MORRISSEY, INC., THE CONDUIT & FOUNDATION CORP., GLASGOW, INC., BUCKLEY & COMPANY, THE NYLEVE COMPANY, ERB ENGINEERING & CONSTR. CO., PERKINS, KANAK, FOSTER, INC., LANSDOWNE CONSTRUCTORS, INC.,

Intervening Plaintiffs

v.

THE SECRETARY OF LABOR, GEORGE P. SHULTZ, ET AL.,

Defendants.

MEMORANDUM OPINION AND ORDER.

WEINER, *J.* March 13, 1970

The Contractors Association of Eastern Pennsylvania consisting of a group of contractors, engaging in heavy highway and utility construction and intervening contractors have sued various Federal officials and the General State Authority of the Commonwealth of Pennsylvania

in an effort to strike down a regulation issued by the Department of Labor which is entitled the "Revised Philadelphia Plan". The Plan covers six construction trades[1] and geographically applies to Bucks, Chester, Delaware, Montgomery and Philadelphia Counties in Pennsylvania. The Philadelphia Plan became effective on September 29, 1969. It was issued on June 27, 1969, in implementation of the authority of the Secretary under Executive Order 11246 of September 24, 1965 as amended, 30 F. R. 12319, 32 F. R. 14303, 34 F. R. 12986 which required that Federal contracts and federally assisted construction contracts contain specified language obligating the contractor and his subcontractors not to discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The Executive Order further required the contractors and subcontractors to "take affirmative action to insure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin". Executive Order 11246, § 202(1). Failure to comply with the required contractual commitments imposes various sanctions on the contractors which include the cancellation, suspension or termination of contracts and the debarment of a contractor from further Government contracts. However, no sanction may be imposed unless efforts at voluntary resolution have failed nor without affording the contractor an opportunity for a hearing. Thus the seeds of the Philadelphia Plan were planted. Two separate orders were issued by the Department of Labor, the first on June 27 and the second on September 23, 1969. In substance, the Plan required that with respect to construction contracts in the Philadelphia area which are subject to Executive Order 11246 and where the estimated

1. Iron workers, plumbers and pipe fitters, steamfitters, sheet metal workers, electrical workers, and elevator operators.

total cost of the construction project exceeds $500,000, each bidder must, in the affirmative action submitted with his bid, "set specific goals of minority manpower utilization which meet the definite standard" included in the invitation for bids. The bidder could also meet this requirement by agreeing to participate in a multi-employer affirmative action program approved by the Office of Federal Contract Compliance.

The Department of Labor order of June 27th was based on the department's finding that although the overall minority groups representation in the construction industry in the five-county Philadelphia area was thirty (30) percent, in the six trades involved, minority representation was approximately one (1) percent. The Department of Labor concluded that the contributing factors to the small number of minority representation in these trades were due to the following:

(a) Contractors hire a new employee complement for each construction job on the basis of referral by the construction craft unions;

(b) The refusal of certain of these unions to admit Negroes to membership or apprenticeship programs;

(c) A preference in work referrals to union members and to persons who had work experience under union contracts.

This resulted in a departmental finding that "special measures" were necessary to provide equal employment opportunity in these six trades for federally involved construction.

Predicated upon public hearings held in Philadelphia on August 26, 27 and 28, 1969, the September 23rd Order issued. This order established the ranges within which the contractor's minority group employment goals should be set. It provided that in the first year, employment "ranges" vary between four (4) and nine (9) percent;

in the second year between nine (9) and fifteen (15) percent; in the third year between fourteen (14) and twenty (20) percent; and in the fourth and last year between nineteen (19) and twenty-six (26) percent. The mathematical formula was based on findings as to the availability of minority group persons for employment and the impact of the program on the existing labor force and a determination that a contractor could commit himself to the employment goals "without adverse impact on the existing labor force" which goals may be met through the employment by the contractor of journeymen, trainees or apprentices.

Safeguards are provided by the Plan. The obligation to meet the goals is not absolute. If the contractor meets the goals he will be presumed to be in compliance with the requirements of the Executive Order. The regulation also states: "In the event of failure to meet the goals, the contractor shall be given an opportunity to demonstrate that he made every good faith effort to meet his commitment. In any proceeding in which such good faith performance is in issue, the contractor's entire compliance posture shall be reviewed and evaluated in the process of considering the imposition of sanctions". Executive Order 11246 § 8(a). Under the Plan, for the purpose of determining whether the contractor is in compliance, it is "no excuse" that the union with which he has a collective bargaining agreement fails to refer minority employees.

Since the Philadelphia Plan went into effect, we have been advised that six contracts have been let involving a total cost of approximately $37 million, with Federal assistance totaling approximately $11 million. The present action is before us in connection with a grant from the Department of Agriculture to the Commonwealth of Pennsylvania in connection with the Brandywine water conservation project, involving a cost of approximately $4 mil-

lion, of which approximately $1.1 million of which represents Federal assistance. Invitation for bids including the requirements of the Philadelphia Plan were issued by the General State Authority of Pennsylvania. No contracts have as yet been awarded on this project.

This law suit is bottomed upon the plaintiffs' allegation that the Philadelphia Plan violates the Constitution and laws of the United States and the laws of the Commonwealth of Pennsylvania. In conjunction with its complaint the plaintiffs have filed a motion for a preliminary injunction and have moved for summary judgment. The defendants have countered with a motion to dismiss the complaint or in the alternative, for summary judgment.

We will first consider the defendants' attack upon the standing of the plaintiffs to maintain this action. Defendants argue that the plaintiffs lack standing to challenge the validity of the Philadelphia Plan. They place their reliance upon the decision of the Supreme Court in *Perkins v. Lukens Steel Co.*, 310 U. S. 113 (1940). In *Perkins*, the Secretary of Labor fixed minimum wages which government contractors were required to pay their employees. The suit of the plaintiffs, iron and steel manufacturers, who bid on government contracts, for declaratory and injunctive relief was dismissed on the ground that the plaintiffs lacked standing to challenge the validity of the Secretary's directive. We, of course, do not and cannot quarrel with the edict of the Supreme Court which settled the principle that:

> "Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases. . . . It was not intended to be a bestowel of litigable rights upon those desirious

of selling to the Government; it is a self-imposed restraint for violation of which the Government . . . but not private litigants . . . can complain." *Perkins v. Lukens Steel Co., supra* at 127.

The defendants contend that the plaintiffs are in the same class of litigants described in *Perkins* and therefore lack standing to attack the requirements contained in Executive Order 11246. To the contrary, the plaintiffs argue that as the impact of the governmental action is greatest on them, access to the courts is permissable.

Our examination of the record reveals that the Contractors Association is a corporation comprised of more than eighty business organizations engaged in heavy construction. Certain of its members wished to bid on the project and four of its members did bid. The plaintiff acts as spokesman for its members concerning the relationship between its members and the government.

Undoubtedly, the force of Executive Order 11246 is focused upon contractors who desire to bid on federal or federally assisted construction contracts. Of necessity, the Order will require them to make significant changes in their every day business practices or they will be clearly exposed to the imposition of strong sanctions. In *Abbott Laboratories v. Gardner,* 387 U. S. 136, 153 (1967) a compendium of the most recent legal principles applicable to the kind of problem governing standing, the Supreme Court said:

"Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar or some

other unusual circumstance, neither of which appears here."

It is apparent that the legal issue that the plaintiffs have presented is fit for judicial resolution. It is also evident that the Executive Order will require significant changes in the contractors' employment practices which, under certain circumstances, may subject them to serious penalties. There remains, however, the problem of determining the circumstances under which the plaintiffs may have the necessary standing to maintain this action. The answer depends, in part, upon the breadth of a group of cases which influenced and in large measure dominated the law on this subject. *Hanson v. Denckla,* 357 U. S. 235, 244 (1958) reaffirmed the principle that a person cannot invoke the jurisdiction of the court to vindicate the right of a third party. See: *Liberty Warehouse Company v. Burley Tobacco Growers' Co-Operative Marketing Association,* 276 U. S. 71 (1928); *Dahnke-Walker Company v. Bordurant,* 257 U. S. 282, 289 (1921). *Flast v. Cohen,* 392 U. S. 83, 98 (1968) is cited as authority for the principle that:

> ". . . The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions'. *Baker v. Carr,* 369 U. S. 186, 204 (1962). 'In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable' ".

A financial loss is not by itself a sufficient interest to sustain a judicial challenge to governmental action. *Ab-*

bott Laboratories v. Gardner, 387 U. S. at 152, *supra; Perkins v. Lukens Steel Co., supra; Frothingham v. Mellon,* 262 U. S. 447 (1923).

It is our opinion that the Contractors Association lacks standing as a proper party to request an adjudication because of its failure to establish that the association has a personal stake in the outcome of the controversy. From the averments of the complaint and supporting documents filed with us, we are compelled to recognize that the harm complained of is possible discrimination against the members of its organization. See also: *Heald v. District of Columbia,* 259 U. S. 114 (1922). But we have no doubt that the contractors have sufficient standing as plaintiffs. The Executive Order is focused upon them; they will have to alter their previous method of hiring and a failure to exert the "good faith effort" to meet his commitment will expose them to the imposition of sanctions. This case is, therefore distinguishable from *Perkins v. Lukens Steel Co., supra,* and falls within the orbit of *Abbott Laboratories v. Gardner, supra.* The motion of the defendants for a dismissal of the cause of action instituted by the Contractors Association of Eastern Pennsylvania will be granted. The motion for dismissal as it relates to the intervening plaintiffs will be denied.

Our next inquiry concerns itself with the problem of whether or not the provisions of the Philadelphia Plan for commitment to specific goals for minority group participation is in conflict with Title VII of the Civil Rights Act of 1964, 42 U. S. C. 2000(e) *et seq.* Initially, we note, that in support of their respective motions for summary judgment counsel concede that on this issue there is no genuine issue of material fact and thus, as a matter of law, the issue is ripe for judicial determination. We shall therefore consider and determine that question now. Having summarized the historical background relating to the issuance

of past executive orders we will now review the conflicting issues raised by the parties. The plaintiffs contend that the executive branch is without the power to require a Philadelphia Plan commitment because the conduct required of a contractor under that plan would violate Title VII of the Civil Rights Act. The Act provides in relevant part that it is an unlawful practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

The plaintiffs have forcefully and ably argued that the Philadelphia Plan will require a contractor to hire and employ on the basis of and with regard to race, color and national origin. They adhere to the theory that the Plan imposes racial "quotas"; that it requires "preferential" treatment for minority persons and so creates reverse discrimination or in the ordinary context, the contractors, in order to meet his goals would necessarily have to discriminate against white persons in order to hire minority applicants.

In response the defendants deny that the Philadelphia Plan requires an employer to act in a manner which is unlawful under Title VII. They assert that the Philadelphia Plan is a lawful and appropriate implementation of the affirmative action obligation of Executive Order 11246.

The Court is of the opinion that the Plan is not in conflict with the provisions of the Civil Rights Act. We agree with the view expressed by the Court in *Weiner v. Cuyahoga Community College District*, 238 N. E. 2d 839, 844 aff'd 249 N. E. 2d 907 (1969), *cert. denied* — U. S. — (1970) where the Court observed:

> "The Court is satisfied that the Civil Rights Act of 1964, Title VII, is constitutional. The Act provides a remedy for a long-continued denial of vital rights of minorities and of every American—the right to—equality before the law—the right in every walk of life in a land whose philosophy is that 'all men are created equal,' to an equal chance of employment in keeping with his ability. To assure obedience to the law is a duty inherent in the government. It may reasonably instruct its agencies how to proceed toward enforcement. There has, as the evidence here shows, come a time when firmness must be used against all who do not feel able or inclined to cooperate in the equal employment effort. The statute and the Executive Order implementing it are in the Court's opinion in full keeping with the constitutional guarantees of the rights of all citizens".

If there is any one lesson that loomed above the others it is that the Civil Rights Act and the Executive Orders both have a common purpose to assure to all an equal chance of employment. Discriminatory obligations are not its intent. This is also the stated policy of the judiciary. The Supreme Court has stated that:

> "[T]he Court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future". *Louisiana v. United States*, 385 U. S. 145, 154 (1965).

The pivotal question, therefore, is whether the Plan demands that the contractors hire on the basis of and with regard to race, color and national origin. Reassertion of this basic postulate becomes necessary because a significant portion of the legal conclusions advanced by the parties are derived from their respective interpretation of the legality of the Plan as it applies to those requirements which impose on the contractors the necessity of

(a) setting specific goals for minority group hiring;

(b) every good faith effort to meet these goals;

(c) that they may not, in so doing, discriminate against any qualified applicant or employee on grounds of race, color, religion, sex or national origin.

We are in accord with that part of the opinion of the Attorney General[2] which reads: "If a plan such as this conflicts with Title VII of the Civil Rights Act, its validity cannot be sustained".

Despite what would appear to be areas of overlap in Title VII and Executive Order 11246, we are not entirely without guidance in determining the propriety of the Order, given the overall goals of the Order and its executive history. The affirmative action requirement issued on September 24, 1965, has been tested and held to be a valid exercise of presidential authority. *Farkas v. Texas Instrument Company,* 375 F. 2d 629 (5th Cir. 1967); Executive Orders have been upheld as having the force and effect of law. *Local 189 v. United States,* 416 F. 2d 980 (5th Cir. 1969); *Farmer v. Philadelphia Electric Company,* 329 F. 2d 3 (3rd Cir. 1964). The heartbeat of "affirmative action" is the policy of developing programs which shall provide in detail for specific steps to guarantee equal employment opportunity keyed to the problems and needs of members

2. See: Opinion of Attorney General, page 9 dated September 22, 1969.

of minority groups, including when there are deficiencies, the development of specific goals and timetables for the prompt achievement of full and equal employment opportunity. The Philadelphia Plan is no more or less than a means for implementation of the affirmative action obligations of Executive Order 11246. The compelling need for implementation is clearly established. The Department of Labor found that "the most reliable data available" shows the following: in the ironworkers union, 1.4 percent of the membership consists of minority group persons; in the steamfitters union, .65 percent consists of minority group persons; in the sheetmetal workers union, 1 percent; in the electricians union, 1 percent; in the elevator construction workers union, .54 percent; and in the plumbers and pipefitters union, .51 percent.[3]

We return to the evocative question of whether the Plan conflicts with Title VII of the Civil Rights Act. We continue our analysis against the backdrop of the established principle that an interpretation of a Presidential order issued by the official charged with administering its provisions is entitled to great, if not controlling weight. *Udall v. Tallman,* 380 U. S. 1 (1964). It is also well settled that the Government has the unrestricted power to fix the terms and conditions upon which it will make needed purchases, *Perkins v. Lukens Steel Co., supra;* unless prohibited by statute. *Abbott Laboratories v. Gardner, supra.* Our analysis of the plaintiffs' argument indicates to us that the genesis of their complaint is that compliance with the Plan is tantamount to a guarantee of minority employment. The Court is not persuaded that the plaintiffs' theory is sound. The Plan does not require the contractors to hire a definite percentage of a minority group. To the contrary, it merely requires that he makes every good faith effort to

3. Executive Order 11246, issued on September 24, 1965. 30 F. R. 12319; 32 F. R. 14303; 34 F. R. 12986.

meet his commitment to attain certain goals. If a contractor is unable to meet the goal but has exhibited good faith, then the imposition of sanctions, in our opinion, would be improper and subject to judicial review. See: *Copper Plumbing & Heating Company v. Campbell,* 290 F. 2d 368 (C. A. D. C. 1964); *Gonzales v. Freeman,* 334 F. 2d 570 (C. A. D. C. 1964). It is equally clear that if this plan is properly administered it will be a plan of inclusion rather than exclusion. This we feel is necessary as our times demand skilled craftsmen who have learned their craft and who must have an opportunity to make use of their abilities and skills. The strength of any society is determined by its ability to open doors and make its economic opportunities available to all who can qualify. It is fundamental that civil rights, without economic rights, are mere shadows. These two rights are not only equal but a must, and when realized will bring into full play that protection to which our Constitution and statutes are dedicated. In summary, it is our conclusion that the Philadelphia Plan is not inconsistent with the requirements of Title VII of the Civil Rights Act of 1964.

Attacking the geographical aspect of the Plan, the plaintiffs contend that the requirement of the Plan's commitment is an unconstitutional exercise of Executive power because it is an arbitrary and capricious classification by the Executive branch, based solely and exclusively on artificial geographic boundaries without any other justification in fact or law and thus violated the Fifth and Fourteenth Amendment guarantees of equal protection of the laws.

It is abundantly clear that Congress has the authority to limit its attention to the geographic areas where immediate action seems necessary. *South Carolina v. Katzenbach,* 383 U. S. 301, 328 (1966); and equal authority rests in legislative treatment by a state. *McGowan v. Maryland,*

366 U. S. 420, 426 (1961); *Salsburg v. Maryland,* 346 U. S. 545, 550 (1954). Also that the Equal Protection Clause relates to equality between persons as such rather than between areas. *Salsburgh v. Maryland,* supra, at 551:

> "The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each state prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several States without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same state." *Missouri v. Lewis,* 101 U. S. 22, 31 (1879).

However, the plaintiffs submit that this is a legislative prerogative which is denied to the Executive branch. It is also suggested that a geographical selection, to be valid, must be based on some peculiarly local condition not present in other areas of the country.

While our research and that of the parties have failed to uncover any cases dealing explicitly with this doctrine, i.e. the legality of the Executive to designate a particular area, this Court, however, is of the opinion that the executive branch of the federal government has the right to issue an order that applies to a limited area. We are of the view that the instant order has the force of law. Cf. *Farmer v. Philadelphia Electric Company, supra,* and may be equated with the authority of a Congressional or Legislative Act limiting legislation to a specific area.

The plaintiffs propose to the Court that the Plan is arbitrary and capricious because its force is directed

against the contractors, who admittedly are not responsible for the evil and not against the labor unions. It is urged that the findings of the Department of Labor, if legally acceptable, established a pattern of discriminatory membership adopted by the union. It is pointed out that the plaintiffs are not individually or collectively charged with racially discriminatory hiring practices. But, as a matter of common knowledge, as buttressed by the findings of the Department of Labor, we recognize that the contractors are compelled to rely on the construction craft unions as their prime or sole source of their labor and that most people in these classifications are referred to the jobs by the unions.

We acknowledge that the position in which the contractors find themselves is rather unfortunate and perhaps the solution may become difficult. Nevertheless, as we had previously determined, the Government, unless forbidden by law, has the unrestricted power to fix the terms, conditions and those with whom it will deal. *Perkins v. Lukens Steel Company, supra; King v. Smith,* 392 U. S. 309, 333 (1969). At this juncture it is appropriate to observe that the Plan requires the contractors to take minority group representation into account in their recruiting and hiring practices. This should be done. As stated in *Norwalk Core v. Norwalk Redevelopment Agency,* 395 F. 2d 920, 931 (2d Cir. 1968):

> "What we have said may require classification by race. That is something which the Constitution usually forbids, not because it is inevitably an impermissable classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality. Where it is drawn for the purpose of achieving equality it will be allowed and to the extent it is necessary to avoid unequal treatment by race, it will be required". See, also,

Offerman v. Nitkowski, 378 F. 2d 22, 24 (2d Cir. 1967); *Springfield School Committee v. Barksdale*, 348 F. 2d 261 (1st Cir. 1965). The plaintiffs have not persuaded us that the Executive Order is constitutionally tainted. We believe that contractual bidding is subject to the terms and conditions set forth in the Order. In light of all the circumstances, and as the Plan sets forth a reasonable method to assure equal treatment for minority groups, if the contractor makes the required good faith effort, the charge of arbitrary and capricious is negated. Our examination of the record indicates to us that the findings of the Department of Labor with respect to minority group representation in the construction industry in the five-county Philadelphia area as compared with representation in the involved trades, representation in the craft unions, and the manner of hiring are amply supported by the evidence adduced at the hearings and also by the studies conducted by the Department of Labor.

The plaintiffs' additional challenge to the validity of the Plan enters into the area of separation of constitutional powers. They call upon the Court to say that Congress is the exclusive branch of our tripartite form of government that has the constitutional authority to design an employment program. We are urged to accept the thesis that the executive is without power to order social change. This contention is fallacious. Thirty years of executive mandates have been enunciated and their validity is established. We look to the initial executive order relative to discriminatory practices first enunciated by President Franklin D. Roosevelt in 1941 and by his successors in office.[4] We have no doubt that the authority to issue the applicable executive orders will withstand any assault. They stem from subsections (a) and (c) of § 205 of the Federal Property

4. President Harry S. Truman in 1951; Dwight D. Eisenhower, 1953, John F. Kennedy, 1961.

and Administrative Services Act of 1949.[5] Sections (a) and (c) provide:

> "(a) The President may prescribe such policies and directives, not inconsistent with the provisions of this chapter. [Chapter 10 of Title 40] . . . chapter 4 of Title 41 . . . as he shall deem necessary to effectuate the provisions of said chapters, which policies and directives shall govern the Administrator and executive agencies in carrying out their respective functions hereunder".
>
> "(c) The Administrator shall prescribe such regulations as he deems necessary to effectuate his functions under this chapter. [Chapter 10 of Title 40] . . . chapter 4 of Title 41 . . . and the head of each executive agency shall cause to be issued such orders and directives as such head deems necessary to carry out such regulations".

We again state that the orders in controversy have the force and effect of law. *Farmer v. Philadelphia Electric Company, supra.*

Having concluded that executive orders are lawful, the question now presented to us is whether the Plan, per se, violates the Constitution or federal statute on the ground that Congressional action alone can require a Philadelphia Plan commitment.

In support of their position the plaintiffs, initially, contend that the executive branch is without power to require a Philadelphia Plan commitment because it violates Title VII of the Civil Rights Act. This question has been previously dealt with in this opinion and it will serve no useful purpose to review the same in detail. Suffice it to say that it is our opinion that the Plan does not conflict with Title VII and from this it follows, a fortiori, that the plaintiffs' contention falls of its own weight.

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5. 40 U. S. C. 486.

We do not subscribe to the plaintiffs' argument that the executive branch lacks power because the conduct required of a Contractor under the Plan would be contrary to the announced policy of the United States. We also reject the plaintiffs' assertion that the Plan is contrary to the express or implied will of Congress. We would say that the opposite view is an accurate portrayal of the policy of our government. Its announced policy is to assure nondiscriminatory employment practices. The Plan complements this most desirable standard. We do not agree with the plaintiffs' argument that it is necessary that Congress delegates power to the executive before it could issue the controversial order. We believe that the prior portions of this opinion have adequately disposed of this problem.

We have given careful consideration to the plaintiffs' remaining contentions. In our view they reassert similar claims although cloaked in different legal garb. The questions presented therein are sufficiently dealt with in this opinion. We find them to be without merit.

In retrospect, it is the Court's belief that the denial of equal employment opportunity must be eliminated from our society. It is beyond question, that present employment practices have fostered and perpetuated a system that has effectively maintained a segregated class. That concept, if I may use the strong language it deserves, is repugnant, unworthy, and contrary to present national policy. The Philadelphia Plan will provide an unpolluted breath of fresh air to ventilate this unpalatable situation. Justice demands an end to all artifices that prevent one, who because of color is estopped from enjoying the same opportunities that are accorded to those of different color. The destiny of minority group employment is the primary issue and the Philadelphia Plan will provide an equitable solution to this troublesome problem.

ORDER.

The plaintiffs' motion for summary judgment is DENIED.

The motion of the Federal defendants to dismiss the action as it relates to The Contractors Association of Eastern Pennsylvania is GRANTED for lack of standing to maintain this suit.

The motion of the Federal defendants for summary judgment is GRANTED.

IT IS SO ORDERED.

CHARLES R. WEINER, *J.*

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question Presented	2
Statutes involved	2
Statement	2
Argument	5
Conclusion	10
Appendix	11

CITATIONS

Cases:	
Federal Housing Administration v. *The Darlington*, 358 U.S. 84	10
Fleming v. *Rhodes*, 331 U.S. 100	10
Griggs v. *Duke Power Co.*, 401 U.S. 424	9
Joyce v. *McCrane*, 320 F. Supp. 1284	5, 6, 8
King v. *Smith*, 329 U.S. 309	6
Local 189, United States Papermakers & Paperworkers v. *United States*, 416 F. 2d 980	9
McDaniel v. *Barresi*, 402 U.S. 39	8
Norwalk CORE v. *Norwalk Redevelopment Agency*, 395 F. 2d 920	
Offerman v. *Nitkowski*, 378 F. 2d 22	6
Perkins v. *Lukens Steel Co.*, 310 U.S. 113	6
Porcelli v. *Titus*, 431 F. 2d 1254	8
Southern Ill. Builders Ass'n. v. *Ogilvie*, No. 4748, S.D. Ill., May 7, 1971	5, 6, 8
Swann v. *Board of Education*, 402 U.S. 1	8
Udall v. *Tallman*, 380 U.S. 1	9
United States v. *City of Chicago*, 400 U.S. 8	9

442-619—71

Cases—Continued

	Page
United States v. *Montgomery County Board of Education*, 395 U.S. 225	8
United States v. *Sheet Metal Workers, Local 36*, 416 F. 2d 123	9
Weiner v. *Cuyahoga Community College District*, 249 N.E. 2d 907, certiorari denied, 396 U.S. 1004	5

Constitution and Statutes:

United States Constitution: Fourteenth Amendment	8
National Labor Relations Act, Section 158(a)(3), as amended, 29 U.S.C. 158(a)(3)	9, 12–13
Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e *et seq*	5, 6, 7, 8, 9, 11–12

Miscellaneous:

110 Cong. Rec. 13650–52	7
115 Cong. Rec. 17131–51	7
115 Cong. Rec. 17625–36	7
Executive Order No. 11246, 41 C.F.R. 60–12	4
Executive Order No. 11246, 3 C.F.R. (Jan. 1, 1966 Rev.) 567, 30 Fed. Reg. 12319	2, 3, 4
Executive Order No. 11375, 32 Fed. Reg. 14303	2
Executive Order No. 11478, 34 Fed. Reg. 12985	2
42 Op. Atty. Gen., Op. No. 37 (1969)	10
49 Dec. Comp. Gen. 59 (1969)	10
S. Rep. 91–616, 91st Cong., 1st Sess	7

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-106

THE CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA, ET AL., PETITIONERS

v.

JAMES D. HODGSON, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1) is reported at 442 F.2d 159. The opinion of the district court (Pet. App. A36) is reported at 311 F. Supp. 1002.

JURISDICTION

The judgment of the court of appeals (Pet. App. A34-A35) was entered on April 22, 1971. The petition for a writ of certiorari was filed on July 21, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Revised Philadelphia Plan for employment practices by contractors engaged in federally-assisted construction projects is a lawful exercise of federal executive power.

STATUTES INVOLVED

Section 703(a) of the 1964 Civil Rights Act, 42 U.S.C. 2000(e)–2(a), Section 703(j) of the 1964 Civil Rights Act, 42 U.S.C. 2000(e)–2(j), and Section 158(a)(3) of the National Labor Relations Act, as amended, 29 U.S.C. 158(a)(3), are set forth in the Appendix, *infra*.

STATEMENT

This suit involves a challenge to the validity of the Revised Philadelphia Plan, which was adopted by the Department of Labor pursuant to Executive Order 11246 (3 C.F.R. (Jan. 1, 1966, Rev.) 567; C.A. App. 56a),[1] and is designed to increase overall minority-group[2]

[1] "C.A. App." refers to the "Appendix to the Briefs" filed in the court of appeals, a copy of which has been lodged with the Clerk of this Court. The Executive Order provides, among other things, that federal contracts, including contracts for federally assisted construction jobs, shall contain provisions obligating the contractor and his subcontractors not to discriminate in employment on account of race, color, religion, sex or national origin, and requiring contractors and subcontractors to "take affirmative action to ensure that applicants are employed and that employees are treated during employment, without regard to their race, color or national origin" (C.A. App. 57a). See also 30 Fed. Reg. 12319 (Sept. 24, 1965), as amended by Executive Order No. 11375, 32 Fed. Reg. 14303 (Oct. 13, 1967), superseded in part by Executive Order No. 11478, 34 Fed. Reg. 12985 (Aug. 8, 1969).

[2] Under the Plan, the term "minority group" means "Negro, Oriental, American Indian and Spanish surnamed Americans" (C.A. App. 30a).

employment in six specified trades in the construction industry in the five-county Philadelphia area covered by the Plan.[3] The plaintiffs include certain labor and management organizations and companies engaged in construction activities in the affected area.

For construction contracts which are subject to Executive Order 11246 and in which the estimated cost of the project exceeds $500,000, the Plan requires that the affirmative action program submitted by each contractor with his bid must include "specific goals of minority manpower utilization" which are within the ranges included in the invitation for bids (*id.* at 18a).[4]

The Plan, which went into effect on September 29, 1969, covers six construction trades—ironworking, plumbing and pipefitting, steamfitting, sheetmetal, electrical and elevator construction. The Plan is based on the Department of Labor's findings that although over-all minority-group employment in the construction industry in the five-county Philadelphia area was 30 per cent, in the six trades affected by the Plan it

[3] The Plan is contained in two separate orders issued by the Department of Labor in June and September of 1969 (C.A. App. 17a, 32a).

[4] The Plan sets forth ranges within which the contractor's minority-group employment goals must be set. These ranges are established each year for the ensuing four years, and vary between 4 and 9 percent minority employment during the first year and from 19 to 26 percent minority employment during the fourth year (C.A. App. 46a–47a). The ranges are based primarily on findings concerning the availability of minority-group persons for employment and the impact of such a program on the existing labor force. See generally C.A. App. 34a–43a.

was approximately one percent (*id.* at 34a–35a).[5] The Department of Labor determined that special measures were necessary to provide equal employment opportunity in these six trades in accordance with the requirements of the Executive Order.[6]

This litigation arose out of a Department of Agriculture grant of approximately $1.1 million to the Commonwealth of Pennsylvania in connection with a water conservation project, costing a total of approximately $4 million. Invitations for bids, including the requirements of the Philadelphia Plan, were issued by the State in November 1969, and in January 1970 this action was filed in federal district court challenging the inclusion of such a provision in the invitation, and naming, among others, certain federal officials as defendants. The district court granted the federal defendants' motion for summary judgment,[7] and the court of appeals affirmed.

[5] The Department of Labor found that the small number of Negroes in these trades was due to the exclusionary practices of the labor organizations representing employees in these trades, including their failure to admit Negroes to membership or appenticeship programs, and to the preferences in work referrals granted to union members and to persons who had work experience under union contracts (C.A. App. 18a–19a).

[6] C.A. App. 21a. Pursuant to regulations, the Director of the Office of Federal Contract Compliance in the Department of Labor has the authority to issue rules implementing E.O. 11246, 41 C.F.R. 60–1.2. This delegation was made pursuant to Section 401 of Part 4 of E.O. 11246 (3 C.F.R., *supra*, p. 575), which, in pertinent part, provides the "Secretary of Labor may delegate * * * any function or duty * * * [to issue rules and regulations' implementing E.O. 11246] except authority to promulgate rules and regulations of a general nature."

[7] As to certain of the plaintiffs, the district court granted, on standing grounds, the federal defendants' motion to dismiss

ARGUMENT

The Revised Philadelphia Plan provides goals and timetables for minority participation in six trades in federally-assisted construction work in the Philadelphia area, where such participation in those trades has previously been one percent or less. Because similar plans have been adopted in Washington, Atlanta, St. Louis and San Francisco, and may well be adopted in other large metropolitan areas, the Philadelphia Plan is a major element in the government's program to provide equal employment opportunities to minority workers. As both courts below recognized, adoption of the Plan was well within the authority of the Department of Labor (and the President) and the Plan is fully consistent with Title VII of the Civil Rights Act of 1964. For that reason, and because the decision below is in accord with other judicial decisions involving similar plans,[8] further review by this Court is not warranted.

1. The courts below correctly held that the federal executive has the authority to require fair employ-

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the action. The standing question was raised on appeal, but the court of appeals found it unnecessary to reach the issue since "[a]ll plaintiffs have been represented by the same attorney, and the presence or absence of the Association as a plaintiff has no practical significance" (Pet. App. A10).

[8] *Weiner* v. *Cuyahoga Community College District*, 238 N.E. 2d 839, affirmed, 249 N.E. 2d 907 (S. Ct. of Ohio), certiorari denied, 396 U.S. 1004 (concerning the former Cleveland Plan); *Joyce* v. *McCrane*, 320 F. Supp. 1284 (D. N.J.) (New Jersey Medical College Plan); *Southern Ill. Builders Ass'n* v. *Ogilvie*, No. 4748, S.D. Ill., decided May 7, 1971.

ment conditions in construction contracts involving projects supported, in whole or in part, by federal funds. In reaching that conclusion, the court of appeals rejected the contention, renewed here, that such action by the executive amounts to legislation which, to be lawful, must originate in Congress. The court noted that "discrimination in employment [is] likely to affect the cost and progress of projects in which the federal government [has] both financial and completion interests" (Pet. App. A20) and held that, in order to protect those interests, "inclusion [of the Philadelphia Plan provisions] as a precondition for federal assistance [is] within the implied authority of the President and his designees" (*id.*). Recognition of this authority is especially compelling when the matter is viewed in light of the firm commitment Congress has made against racial discrimination in employment practices. See generally Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e, *et seq.*

Given the Executive's general authority to require fair employment conditions in construction contracts such as the one involved here, the specific requirements of the Philadelphia Plan, so long as they violate neither the Constitution nor federal law, are a proper exercise of the federal government's right to set "the terms and conditions upon which its money allotments * * * [are] disbursed." *King* v. *Smith*, 392 U.S. 309, 333 n. 34. See *Joyce* v. *McCrane*, 320 F. Supp. 1284, 1290 (D. N.J.); *Southern Illinois Builders Association* v. *Ogilvie*, No. 4748 (S.D. Ill., May 7, 1971) (slip op., p. 12); cf. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113.

Moreover, Congress, with full knowledge of executive activities in this area, has indicated its approval. Not only has Congress explicitly acknowledged the validity of the Executive Order upon which the Plan is based (see 42 U.S.C. 2000e–8(d); see also 110 Cong. Rec. 13650–13652 (June 12, 1964)), and, "aware of Presidential action with respect to federally assisted construction projects since June of 1963, * * * continued to make appropriations for such projects" (Pet. App. A 20), but it has also rejected a legislative attempt to ban use of federal funds to finance contracts which contain the Philadelphia Plan provisions. See 115 Cong. Rec. S. 17131–17151, Dec. 18, 1969 (daily ed.); 115 Cong. Rec. S. 17625–17636, Dec. 22, 1969 (daily ed.); S. Rep. No. 91–616, 91st Cong., 1st Sess., p. 19 (1969).

2. The court of appeals also correctly "reject[ed] the contention that Title VII [of the 1964 Civil Rights Act] prevents the President acting through the Executive Order program from attempting to remedy the absence from the Philadelphia construction labor of minority tradesmen in key trades" (Pet. App. A24–A25). For, as that court noted, "[t]o read [the anti-discrimination provisions of Title VII] in the manner suggested by the plaintiffs we would have to attribute to Congress the intention to freeze the status quo and to foreclose remedial action under other authority designed to overcome existing evils" (Pet. App. A24).[9] It is, of course, contemplated that

[9] This applies equally to the contention that Section 703(j) of Title VII, 42 U.S.C. 2000e–2—the anti-preferential treatment provision—invalidates the affirmative action program

those employers subject to the Plan will make race or national origin a factor for consideration in the hiring process. Even in the absence of a judicial finding of prior discrimination based on race,[10] this kind of color consciousness, designed to prevent or remedy a pattern of racial discrimination, does not violate the equal protection clause of the Fourteenth Amendment. See, *e.g.*, *Porcelli* v. *Titus*, 431 F. 2d 1254 (C.A. 3); *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F. 2d 920, 931 (C.A. 2); *Offermann* v. *Nitkowski*, 378 F. 2d 22 (C.A. 2); cf. *McDaniel* v. *Barresi*, 402 U.S. 39, 41. And in light of the Plan's inherent remedial purpose, there is plainly no conflict with Title VII.[11] See *Joyce* v. *McCrane*, *supra*, at 1291; *Southern Illinois Builders Association* v. *Ogilvie*, *supra*, at 15.

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embodied in the Revised Philadelphia Plan. That provision does not purport to be a prohibition, but is, instead, simply a disclaimer of granting new power. As the court of appeals stated, "Section 703(j) is a limitation only upon Title VII, not upon any other remedies, state or federal" (Pet. App. A 22). Cf. *Swann* v. *Board of Education*, 402 U.S. 1, 16–18 (construing similar provisions in Title IV of the 1964 Civil Rights Act, 42 U.S.C. 2000c, *et seq.*).

[10] Such a finding is not required here, since the ultimate authority for the Plan inheres in the federal government's right to contract on its own terms. Of course, where there has been a judicial finding of discrimination in violation of either the Constitution or statute, courts can require that race be taken into account as part of the remedial process. See, *e.g.*, *Swann* v. *Board of Education*, *supra*, at 19; *United States* v. *Montgomery County Board of Education*, 395 U.S. 225.

[11] The "affirmative action" requirement of the Executive Order is apparently premised on the idea that "color-consciousness * * * [is] an appropriate remedial posture" (Pet. App. A24). Accordingly, contrary to petitioners' assertion, there is no inconsistency between the nondiscrimination provision of the

3. Finally, the court of appeals correctly held that the Plan is consistent with federal law protecting exclusive union referral systems. The Revised Philadelphia Plan provides that "'[i]t is no excuse that the union with which the contractor has a collective bargaining agreement failed to refer minority employees'" (Pet. App. A25). Implied in this, of course, is the "requirement that the contractor look to other sources for employees if the unions fail to refer sufficient minority group members" (Pet. App. A26). While this may, in some circumstances, place the contractual undertakings of a contractor bidding on a federally assisted project at variance with the hiring hall arrangements contained in his collective bargaining agreement, such an agreement, even where lawful,[12] cannot immunize the contractor from the requirements lawfully imposed upon him by the Plan.[13] Indeed, if this were not so, "the employer

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Executive Order and the specific requirements of the Plan. Moreover, as the court of appeals noted, "more than ordinary deference [should be given] to an administrative agency's interpretation of an Executive Order or regulation which it is charged to administer" (Pet. App. A29). See, *e.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 434; *United States* v. *City of Chicago*, 400 U.S. 8; *Udall* v. *Tallman*, 380 U.S. 1.

[12] Of course, collective bargaining agreements which perpetuate the effects of past discrimination are unlawful under Title VII and invalid. See, *e.g.*, *United States* v. *Sheet Metal Workers, Local 36*, 416 F. 2d 123, 132 (C.A. 8); *Local 189, United Papermakers & Paperworkers* v. *United States*, 416 F. 2d 980 (C.A. 5).

[13] While the National Labor Relations Act does authorize use of the kind of exclusive referral systems involved here, the practice is certainly not required (Pet. App. A26). See generally 29 U.S.C. 158(a)(3).

[could] evade [the] obligation by contracting away his power to perform it," thereby reducing the Plan to "an exercise in futility" 42 Op. Att'y Gen., Op. No. 37 (1969), at p. 9. Cf. *Federal Housing Administration* v. *The Darlington*, 358 U.S. 84, 91; *Fleming* v. *Rhodes*, 331 U.S. 100, 107. Thus, since there is "[n]othing in the National Labor Relations Act [which] purports to place any limitation upon the contracting power of the federal government" (Pet. App. A26–A27), it is plain that the United States, acting through the executive branch, is free to insist that its contractors depart from their customary reliance on union referrals where that practice conflicts with the employers' obligation to provide equality of employment opportunity under a valid Executive Order.[14]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1970.

[14] The difference in the opinions previously expressed by the Comptroller General (see 49 Dec. Comp. Gen. 59 (1969)) and the Attorney General (42 Op. Att'y Gen., Op. No. 37 (1969)) on the Philadelphia Plan does not require review of the decision below by this Court. Since federal funds are being disbursed under the Plan, petitioners' allegations of "conflict" and "uncertainty" (Pet. 8–9) are, at most, extremely speculative.

APPENDIX

Section 703(a) of the 1964 Civil Rights Act, 42 U.S.C. 2000(e)-2(a), provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(j) of the 1964 Civil Rights Act, 42 U.S.C. 2000(e)-2(j), provides:

> Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment

by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area:

Section 158(a)(3) of the National Labor Relations Act, as amended, 29 U.S.C. 158(a)(3), provides:

(a) It shall be an unfair labor practice for an employer—

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an

agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

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